Filed 6/6/17 Guardianship of A.B. CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

Guardianship of the Person and Estate of A.C.B., a Minor.	C081575
CHRISTOPHER J. BAKES, Petitioner and Appellant, v. MARLO FLORES-BAKES, Objector and Respondent.	(Super. Ct. No. 34-2015-00184261-PR-GP-FRC)

After his brother died, Christopher J. Bakes (Uncle) helped his brother's widow Marlo Flores-Bakes (Mother) raise her three children; one is still a minor. Uncle formed the belief Mother was not a fit parent. He hired an investigator to follow her, had a GPS tracker installed in the car he gave her to use, and monitored the mobile telephone he gave her to use. He filed the instant guardianship petition, and submitted his investigator's report and other material to Child Protective Services (CPS). A

dependency case was filed in which he unsuccessfully sought de facto parent status. He appealed in that case. Meanwhile, a hearing on his guardianship petition took place, at which the probate court also refused to classify him as a de facto parent. The probate court's order is the subject of the instant appeal. We previously denied his motion to consolidate the appeals.

After dependency proceedings were terminated, we took judicial notice of the relevant orders, and dismissed Uncle's appeal in that case as moot. We then ordered supplemental briefing in this case to determine whether this appeal, too, was moot.

We conclude this appeal is moot, for several related reasons. First, a dependency proceeding takes precedence over a guardianship proceeding, and all of the evidence tendered in support of the guardianship petition--and more--was available to the dependency court. Second, the facts leading to sustaining dependency jurisdiction and--more importantly--terminating it, show that the facts alleged in the guardianship petition are now stale. Thus, reviewing the ruling denying the guardianship petition would be to ignore materially changed circumstances, making any decision on the merits academic. (Cf. Civ. Code, § 3532 ["The law neither does nor requires idle acts"].)

We also observe that the minor turned 13 this year, and he has two adult siblings. He is neither so young nor so isolated that he cannot report any future problems; indeed, the record shows that he was able to discuss his situation with CPS. Contrary to Uncle's counsel's speculations, we presume CPS can respond if necessary in the future, and if it does not, a new guardianship petition--containing updated facts--can be filed.

BACKGROUND

The minor was born in 2004 and has a brother and sister who are now adults; his father passed away in 2006. Uncle, a local attorney, supported Mother and her three children after his brother passed away. This included paying for housing, school tuition, and other support. He has a room in his house for the minor's use, and supported the

minor personally, such as by attending sporting events, going to parent-teacher meetings, and taking other actions typically performed by a parent.

Uncle, represented by counsel, filed the instant guardianship petition on September 16, 2015, alleging in part "I have acted as [minor's] parent figure for 5+ years. CPS instructed me to pursue guardianship of [him] based on information reported to them indicating that [he] is suffering emotional and physical harm, through neglect by his mother of his physical, emotional, medical, dental, and academic needs. [His] mother has suddenly cut [him] off from me, his de facto father. He is and will continue to suffer severe neglect and emotional abuse unless my petition is granted."[1] Uncle alleged Mother was unfit for various reasons, including substance abuse, criminal activity, and an unfit boyfriend. He also alleged she neglected the minor's nutritional and medical needs, and that he acted as a de facto parent for several years, having custody between 50 and 100 percent of the time. Uncle declared Mother cut off his contact with the minor at the end of July 2015. The petition was supported by exhibits which, if believed, tended to support the petition.

Mother--at times represented by counsel in the trial court, but unrepresented on appeal--opposed the petition, submitting evidence that, if believed, negated Uncle's claims. She declared she had had 100 percent legal and physical custody of the minor since his birth, although she had allowed him to spend time with Uncle, and she provided adequate medical and dental care for him. Letters from a pediatrician and a dentist supported the latter claims. Mother denied she was involved in unlawful substance abuse, and declared "It is [Uncle's] behavior, which borders on illegal stalking and illegal

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[1] Because of understaffing, "where the allegations against the parent . . . are borderline (*i.e.*, not substantiated by police or hospital records), child welfare workers may encourage family members to petition the probate court for guardianship rather than bring the case through the social welfare department." (Cal. Guardianship Practice (Cont.Ed.Bar 2016) Alternatives to Probate Guardianship, § 2.4, pp. 35-36.)

surveillance through recording, video-taping, and other methods, in addition to his deceitful actions regarding representing himself to be [minor's] legal guardian, which have led me to curtail the amount of time [minor] spends with [Uncle], which, in turn, has had a temporary negative effect on the emotions of my child. In essence, [Uncle] has created the drama that is affecting my child."

On November 3, 2015, a probate court investigator recommended dismissing the petition because CPS was investigating the case, and "[i]f it is their determination that the child is indeed at risk residing with his mother, the child will be removed from her care and [Uncle] may apply to CPS to take the child into his care. If, after CPS has completed their investigation and has determined that the child is not at risk, the child will remain with his mother, resulting in no need for a guardianship." The trial court (DeAlba, J.) continued the matter pending the outcome of the CPS review.

After further declarations and exhibits submitted by Uncle's counsel disputing the amount of his custody of the minor and other matters, a new probate court investigator's report was filed on January 12, 2016, stating in part:

> "On January 8, 2016, the undersigned spoke with CPS supervisor, Cindy Scott. She stated the investigation indicated there had been no evidence of child abuse or neglect, and the child's physician had reported no concerns regarding the child's care. The mother was found to be appropriate, but [Uncle] displayed inappropriate behaviors such as pounding on doors at the physician's office. As a result, the doctor is no longer willing to work with him. Ms. Scott referred this matter to CPS social worker Jacqueline Hobbs for further investigation.
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> "On January 12, 2016, the undersigned spoke with Ms. Hobbs by telephone. She stated the referral is still open, but there are no indications that the child needs to be removed from the mother's care. The mother may be offered CPS services if she is willing to accept them, but she is not required to participate in services. Since the referral remains open, there is no disposition noted yet on this matter.
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> "It appears that the child is not at risk of harm in the mother's care, and CPS is continuing to monitor the situation until they are able to close this referral. It appears that there is no need for a guardianship at this time."

The report recommended that the guardianship petition be denied, as CPS had refuted to its satisfaction the allegations made by Uncle's counsel.

Uncle's counsel objected to this report, arguing it improperly viewed the CPS determination as dispositive of the guardianship case, and because of purported statutory violations regarding the scope and content of such reports. Uncle's counsel also attacked the adequacy of the underlying CPS investigation.

At a hearing on January 19, 2016, Uncle's counsel conceded any informal custody Uncle may have had was ended by "the end of this July when CPS got involved." The probate court stated it had read all of the declarations submitted by the parties in the guardianship case, and observed in part:

> "[I]t appears that [the minor] lives with mom right now, and it's very difficult for an uncle to come into court on a guardianship petition when mom has custody of the child, even if the uncle thinks the child would do better with uncle. We have a constitutional right of mom under [*Troxel v. Granville* (2000) 530 U.S. 57 [147 L.Ed.2d 49] to be a parent, and we've got statutes that say you need to show clear and convincing evidence of detriment, and this Court doesn't think that just because you think you could be a better parent that that's enough, even if you're a good role model."

After colloquy, the probate court repeated that it had reviewed "the whole file. I have reviewed all of the declarations . . . and I don't think there's a prima facie case here that warrants this matter being set for trial." "I don't see that there's a de facto [parent] status under California Rule of Court 5.502 subdivision 10 regarding day-to-day role of the parent. I don't see a quasi-parental relationship, Family Law Section 3041 (a) and (b) applies. I don't see a prima facie case that there would be a detriment and that it's in the best interest [of the minor] at this time to change custody." The court distinguished this case from one where long-term, day-to-day nonparent care was ongoing (*Guardianship of Vaughan* (2012) 207 Cal.App.4th 1055), denied the petition, and referred the parties to mediation to address visitation.

The written order denying Uncle's petition was filed on February 29, 2016, from which Uncle timely filed this appeal on March 10, 2016.

The Dependency Case (Case No. C082364)

A non-detaining dependency petition was filed by the Department of Health and Human Services (DHHS) on February 26, 2016 (three days before the formal order from which this guardianship appeal was filed). It alleged: (1) alcohol and marijuana abuse impaired Mother's ability to parent; and (2) Mother had left the minor in the care of her inappropriate boyfriend. The initial hearing report states the mother was arrested on February 14, 2016, after she hit a parked car while drunk driving.

On March 8, 2016 (two days before this appeal was filed), Uncle filed a request for de facto parent status. Uncle declared that between June 2010 and July 2015, minor "resided with me anywhere from 50% to 100% of any given week." He conceded contact with the minor ended in July 2015.

On April 21, 2016, dependency jurisdiction was sustained.

DHSS contended Uncle had not "fulfilled on a day-to-day basis" the minor's needs, so as to establish de facto parenthood. A report stated the minor was doing well with Mother, and had been "educated on contacting [DHHS] if he felt unsafe" and had assured the case worker he would make contact if he felt unsafe.

At the hearing, minor's own counsel pointed out that although Mother and Uncle disputed how much time Uncle had had custody of the minor, Uncle had conceded contact had been cut off since August, thus Uncle's information was "somewhat dated in time." Mother's counsel disputed Uncle's claim of substantial custody before then. DHHS's counsel, too, disputed Uncle's claims.

The juvenile court denied Uncle's request for de facto parent status, finding he had not met the relevant criteria. At the dispositional hearing, the juvenile court kept the minor with Mother, under supervision, with services.

On June 9, 2016, Uncle filed two notices of appeal, one from the order denying his de facto parent request, and one from the dispositional order.

On July 18, 2016, we dismissed Uncle's appeal from the dispositional order for lack of standing, citing *In re P.L.* (2005) 134 Cal.App.4th 1357.

On January 5, 2017, we granted requests for judicial notice of further dependency orders. On November 17, 2016, dependency was terminated, with findings that the mother had completed necessary remedial services, the minor "continues to refuse visits with" Uncle, and "Conditions no longer exist which would justify initial assumption of jurisdiction . . . and those conditions are not likely to recur if supervision is withdrawn." After considering Uncle's opposition, we dismissed as moot Uncle's remaining appeal from the order denying his de facto parent request.

Further Action in this Guardianship Appeal

On January 25, 2017, we took judicial notice in this guardianship appeal of the matters judicially noticed in the dependency appeal, and ordered supplemental briefing to determine whether, under the present circumstances, this appeal, too, is also moot.[2]

DISCUSSION

An appeal will be deemed moot when the appellate court determines it cannot grant effective relief even if the appeal were found to have merit. (See *Consol. etc. Corp. v. United A. etc. Workers* (1946) 27 Cal.2d 859, 863 [" 'when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal' "] (*Consol. etc. Corp.*); *Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1574 ["The pivotal question . . .

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[2] We grant Uncle's unopposed motion for judicial notice of the record in the appeal in the dependency case.

is . . . whether the court can grant the plaintiff any effectual relief"]; *In re Pablo D.* (1998) 67 Cal.App.4th 759, 761 [appeal from order extending reunification services moot; "we cannot rescind services that have already been received"].)

Given the outcome in the dependency case, and the passage of time, we conclude this appeal is moot. Had Uncle ever qualified as a de facto parent, it is clear he does no longer, and the facts alleged in his guardianship petition are stale.

"A final judgment in a related proceeding may determine all the issues in a pending appeal and render it moot." (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 753, p. 819.) Here, for the sake of argument, we accept Uncle's view that the dependency order rejecting his de facto parent request does not bar this appeal by issue or claim preclusion. However, we cannot ignore the circumstances leading to the now-final order terminating the dependency proceedings.

By statute, a dependency proceeding takes precedence over any other case involving the custody of the minor(s) involved. (Welf. & Inst. Code, § 304;[3] see *In re Alexander P.* (2016) 4 Cal.App.5th 475, 488; *A.H. v. Superior Court* (2013) 219 Cal.App.4th 1379, 1389; *In re Marriage of Seaman & Menjou* (1991) 1 Cal.App.4th 1489, 1498-1499; Cal. Guardianship Practice, *supra*, § 2.4, p. 36 ["the juvenile court has

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[3] That section provides in part: "After a petition has been filed pursuant to Section 311, and until the time that the petition is dismissed or dependency is terminated, no other division of any superior court may hear proceedings pursuant to Part 2 (commencing with Section 3020) of Division 8 of the Family Code regarding the custody of the child or proceedings under Part 2 (commencing with Section 1500) of Division 4 of the Probate Code, except as otherwise authorized in this code, regarding the establishment of a guardianship for the child. While the child is under the jurisdiction of the juvenile court all issues regarding his or her custody shall be heard by the juvenile court." At oral argument, Uncle's counsel argued for the first time that the filing of the dependency petition deprived the probate court of jurisdiction to enter the order from which this appeal was taken. However, this jurisdictional claim, raised for the first time at oral argument, comes too late. (See *Stevenson* v. *Baum* (1998) 65 Cal.App.4th 159, 167, fn. 8.)

superior jurisdiction over the probate court and, unless the juvenile court relinquishes jurisdiction to the probation court, the probate court action will be either dismissed or abated, pending the outcome in the juvenile court"].) The dependency court orders, even if they do not *legally* undermine Uncle's appeal, are of signal *factual* relevance.

Even if Uncle had once qualified as a de facto parent, as we stated in a family law case where a party attempted to challenge temporary custody orders that had been superseded by a final judgment: "[W]e cannot turn back the clock and restore the custody situation that existed before the orders were made. With the best interests of the child in mind (Fam. Code, § 3011), we cannot undo bonds that were formed or stability that was created by the temporary orders." (*Lester v. Lennane* (2000) 84 Cal.App.4th 536, 566.)

Although we recognize that *Lester* did not involve dependency and guardianship orders, we find the passage just quoted to be instructive in this case as to the issue of mootness. A person who *once* qualified as a de facto parent--as Uncle claims he did--may still lose that status over time. (See *In re A.F.* (2014) 227 Cal.App.4th 692, 700; *In re Leticia S.* (2001) 92 Cal.App.4th 378, 383, fn. 5 [de facto parenthood may be ended when "a changed circumstance no longer supports the status"].) Even if the probate court should have believed all of Uncle's alleged facts, and even if it mistakenly applied the law to those allegations, those allegations are now stale.

Uncle no longer meets the definition of a de facto parent, as he concedes he has had no contact with the minor since the end of July 2015. (See, e.g., *In re Brittany K.* (2005) 127 Cal.App.4th 1497, 1514 [de facto parent lost status in part because she "had not provided regular care to the minors for approximately three years, and had not even seen them—except for one surreptitious and unauthorized visit—for a year"].) De facto parenthood is not a vested civil right, it is a legal status that grants standing to a caregiver in large measure for the purposes of allowing a court to consider " 'critical information relating to the child's best interests.' " (*Id.* at p. 1513, fn. 19, quoting *In re Patricia L.*

(1992) 9 Cal.App.4th 61, 66; see *In re R.J.* (2008) 164 Cal.App.4th 219, 223.) It is now June 2017, and Uncle cannot provide *current* information to the court about the minor's best interests.

It is true that the mere fact that a de facto parent may no longer have custody of the minor at issue does not necessarily vitiate his or her status. (See, e.g., *In re Patricia L.*, *supra*, 9 Cal.App.4th at pp. 67-68 [changed circumstances must be shown].) But here, Uncle has not had any contact with the minor for nearly two years, which is a very long time in the life of a child. Further, it appears undisputed that the minor does not want contact with Uncle at this time. It would be inimical to the purposes of de facto parenthood to ignore these changed circumstances and--assuming we found any merit in Uncle's appeal--remand for a new hearing on the guardianship petition. This is because the petition was predicated on the claim that Uncle was *then* a de facto parent, and supported by evidence which spoke to Mother's circumstances *prior* to receiving services via the dependency system.

Uncle's counsel contends we "must resolve the errors by the probate court below so that upon remand, or even if another petition is filed, it will have the guidance and tools necessary to do justice for this child." We disagree. A party cannot avoid a finding of mootness merely by suggesting its position in future proceedings might be improved by a favorable appellate ruling. "An appeal is prevented from becoming moot only if the rights of the parties are directly affected by its determination. Their interest must be '*immediate* . . . and not a remote consequence of the judgment.' " (*Consol. etc. Corp.*, *supra*, 27 Cal.2d at p. 865, italics added, partly quoting *Hamilton Trust Co. v. Cornucopia Mines Co.* (9th Cir. 1915) 223 F. 494, 499; see *Libby, McNeil, and Libby v. City Nat. Bank* (9th Cir. 1978) 592 F.2d 504, 511.) Therefore, speculation about what might happen in the future is not persuasive on the question of mootness.

Further, we do not share Uncle's counsel's assumption that any purported errors are of the sort likely to recur. Uncle's counsel's headed arguments claim the probate

court (1) applied the wrong standard of proof for de facto parenthood, (2) improperly thought the lack of current custody barred a finding of de facto parenthood, (3) improperly delayed ruling by deferring to the CPS investigation, and (4) improperly relied on a report that did not comply with statutory norms. Each of these is a case-specific claim, resolution of which would not impact a subsequent guardianship case. We must presume trial courts will apply the law correctly. (See *People v. Sangani* (1994) 22 Cal.App.4th 1120, 1138; *In re Fred J*. (1979) 89 Cal.App.3d 168, 175.)[4]

Nor will Uncle be aggrieved by dismissal of this appeal, as in some other cases. *In re Joel H*. (1993) 19 Cal.App.4th 1185 rejected a finding of mootness because the appellant--a de facto parent who had been found to have committed abuse of the minor--would be adversely affected by the judgment. The abuse finding would have preclusive effect in future litigation. (*Id*. at pp. 1192-1193; see also *In re Joshua C.* (1994) 24 Cal.App.4th 1544,1547-1548 [appeal from dismissal of dependency action not moot; adverse jurisdictional findings that party had sexually abused children aggrieved that party because such findings would be binding in future litigation].) In this case, Uncle was not found to be unfit in either the dependency or the guardianship cases. The probate court merely found Uncle's instant guardianship petition did not establish a prima facie case warranting a hearing. Therefore he has not shown that dismissal of this appeal will aggrieve him in any way.

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[4] Uncle's counsel's emphasizes claimed deficiencies in the investigator's report. But in a new guardianship action, a new report could be prepared, if the court did not waive one. (Prob. Code, § 1513, subd. (a) ["Unless waived by the court," a report shall be filed]; *Guardianship of Christian G*. (2011) 195 Cal.App.4th 581, 600.) And because a court may waive such report, the fact the statute specifies what the report "shall" include would seem to be directory, not mandatory. (See *People v. McGee* (1977) 19 Cal.3d 948, 958-959; *In re Conservatorship of James M.* (1994) 30 Cal.App.4th 293, 297-298.) Therefore, any defects in such a report would seem to go to its weight, not its admissibility. (See *Marriage of Winternitz* (2015) 235 Cal.App.4th 644, 651, 653.)

Uncle implies that because the CPS system is dysfunctional, we must reach the merits to send a message or to correct an injustice. This claim is based largely on material not in the record, nor the subject of any motion for judicial notice, which we disregard. (See *Protect Our Water v. County of Merced* (2003) 110 Cal.App.4th 362, 364 ["if it is not in the record, it did not happen"]; *Love v. Wolf* (1964) 226 Cal.App.2d 378, 392, fn. 4.)

Because of substantially changed circumstances, we find this appeal is moot.

DISPOSITION

The appeal is dismissed as moot. Christopher J. Bakes shall pay Marlo Flores-Bakes's appellate costs, if any. (See Cal. Rules of Court, rule 8.278(a)(2).)

/s/
Duarte, J.

We concur:

/s/
Nicholson, Acting P. J.

/s/
Mauro, J.